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IN THE

Supreme Court of the United States

October Term, 1967.

No. 1071

WILLIAM LLOYD SHAKIN, M.D.,

Petitioner and Appellant,

vs.

BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

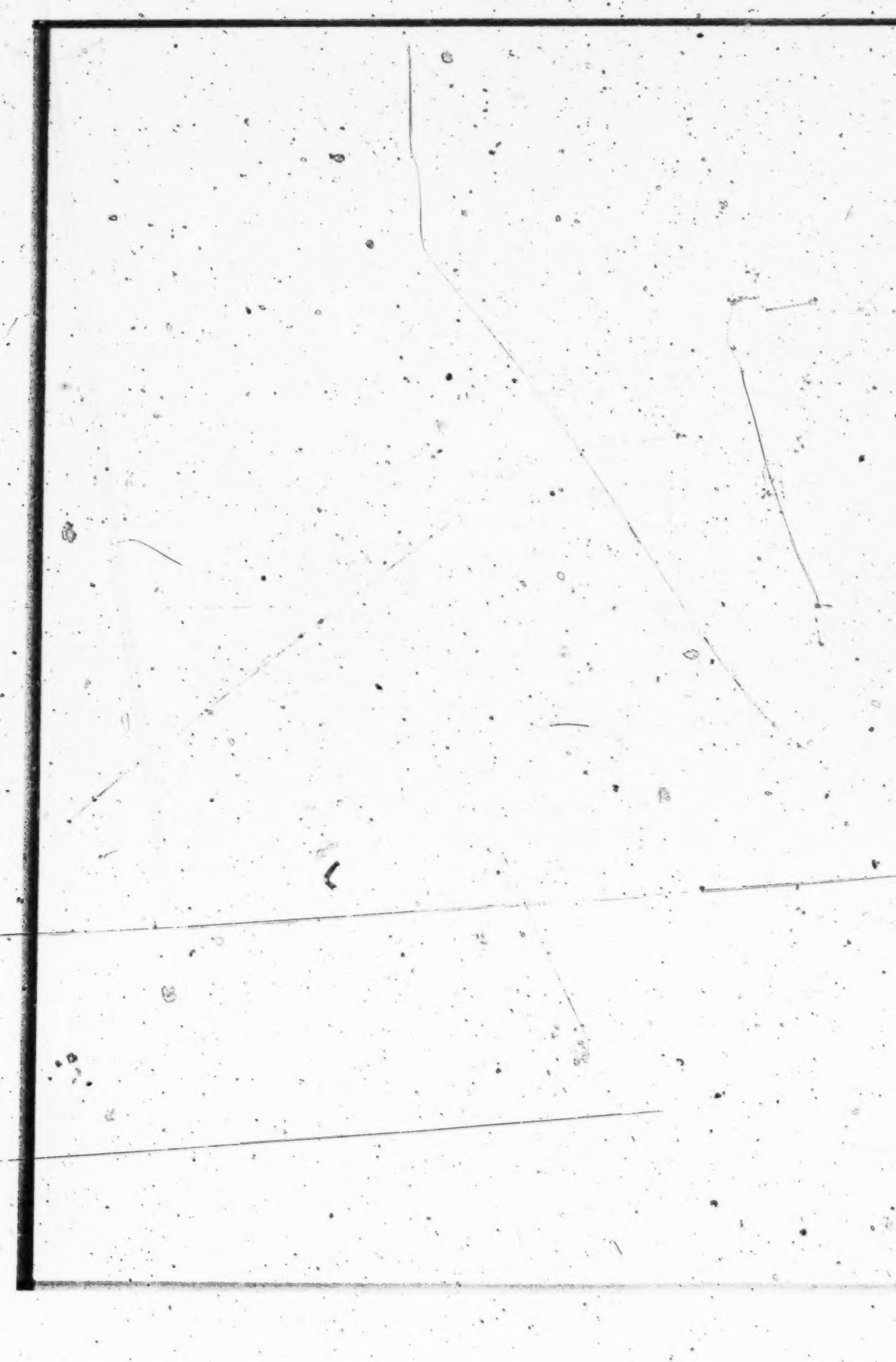
Defendant and Respondent.

Appeal From The Judgment Of The Supreme Court Of The State Of California

MARKS & SCHNEIDER
BURTON MARKS and
HARVEY A. SCHNEIDER
8447 Wilshire Blvd., Suite 217
Beverly Hills, Calif. 90211
Telephone (213) 653-4141

Attorneys for Petitioner and Appellant.

DEAN-STANDEFER COMPANY



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No.

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Petitioner and Appellant,

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BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA,

Defendant and Respondent.

Appeal From The Judgment Of The Supreme Court of The State Of California.

JURISDICTIONAL STATEMENT

(RULE 13(2) and 12)
RULES OF THE UNITED STATES
SUPREME COURT

(a) This is an appeal taken from the order of the

Supreme Court of the State of California dated November 1, 1967, denying, without opinion, a hearing on the decision of the Court of Appeal for the State of California dated September 5, 1967 (Appendix A), affirming the denial of a Petition for Writ of Mandate, which denial was made and entered by the Superior Court of the State of California for the County of Los Angeles on May 27, 1966. Prior to the denial of the Petition for Hearing by the California Supreme Court, a Petition for Rehearing had been denied, without opinion, by the Court of Appeal on October 4, 1967. The opinion of the Court of Appeal is reported officially in Volume 254 Advance California Appellate Reports at page 109. There is no official report of the decision to date.

(b) The jurisdiction of this Court is invoked on the grounds, *inter alia,* that section 1094.5 of the California Code of Civil Procedure has been sustained against a claim of unconstitutionality under the Federal Constitution. Other questions also invoke federal constitutional questions and invoke the jurisdiction of this Court. (See *infra.*)

(i) Appellant's certificate to practice medicine and surgery in the State of California was revoked by the respondent BOARD OF MEDICAL EXAMINERS OF THE STATE OF CALIFORNIA after administrative proceedings were held purportedly pursuant to the provisions of section 1094.5 of the California Code of Civil Procedure. Appellant's Petition for Writ of Mandate, which sought reinstatement of his certificate, was denied by the Superior Court of the State of California for the County of Los Angeles, and this denial was affirmed by the California Court of Appeal, as aforesaid. The California Supreme Court denied a hearing after the decision by the Court of Appeal.

(ii) The judgment of the Superior Court of the County of Los Angeles was entered on May 27, 1966. The decision of the Court of Appeal of the State of California affirming the judgment of the Superior Court was rendered on September 5, 1967 (Appendix A). A rehearing was denied by the Court of Appeal on October 4, 1967. The California Supreme Court denied a hearing on November 1, 1967. The Notice of Appeal was filed on November 20, 1967, in the Court of Appeal of the State of California, the court which is possessed of the record (Rules of the United States Supreme Court, Rule 10(3)).

(iii) Jurisdiction of this Court is conferred by Title 28, U.S.C., section 1257(2).

(iv) Cases believed to sustain the jurisdiction of this Court are:

1. Appellate jurisdiction: *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 73 L.Ed. 184, 187; *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 60 S.Ct. 431, 84 L.Ed. 596, 127 ALR 821; *Lambert v. California*, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed.2d 228.

2. Generally as to subsidiary questions involving constitutional issues: *Scott v. Donald*, 165 U.S. 58, 170 S.Ct. 265, 41 L.Ed. 632.

3. The right to have a license to practice medicine is one of those rights protected under the First and Fourteenth Amendments to the United States Constitution and is encompassed within the definition and concept of the word "liberty": *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239, 77 S.Ct. 752, 1 L.Ed.2d 796, 801-802; *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042-1045.

4. Where procedures are involved affecting First Amendment and Fourteenth Amendment rights, those procedures must be followed with scrupulous exactitude and the most narrow construction possible given to the statutes and procedures involved, so as to permit a minimum of interference with the constitutionally based rights: *Elfbrandt v. Russell,* 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321; *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405; *Right v. Georgia,* 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349.

5. "Due process" and "equal protections": *Palko v. Connecticut,* 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288.

6. The individual's constitutional right to cross-examine witnesses and rebut evidence against him: *Morgan v. United States,* 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129; *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923.

7. The individual's constitutional right to present evidence on the issue of entrapment: *Sorrels v. United States,* 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413; *Cf. Giles v. Maryland,* ___ U.S. ___, 87 S.Ct. ___, 17 L.Ed.2d 737.

8. In the case of disciplinary proceedings involving attorneys in the State of California, all reasonable doubts are resolved in favor of the accused and if equally favorable inferences may be drawn from a proved fact, the inference which leads to a conclusion of innocence, rather than one leading to a conclusion of guilt, will be accepted: *Most v. State Bar,* 67 A.C. 600; *Zitny v. State Bar,* 64 Cal.2d 787, 789-790, 51 Cal.Rptr. 825.

(v) California Code of Civil Procedure section 1094.5 is found in its original form in Stats 1945, c. 868, p. 1636, sec. 1. The section was amended in Stats 1949, c. 358, p. 638, sec. 1. Section 1094.5, as it existed at all times

material to this case and as it presently exists, reads as follows:

"(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

"(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all

other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

"(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

"(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

"(f) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration

of the time for filing such notice whichever occurs first; provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings."

(c) The questions presented on this appeal are as follows:

1. Whether the application and interpretation of California Code of Civil Procedure section 1094.5 with respect to licensed physicians and surgeons denies to such physicians and surgeons liberty, due process of law and equal protections of law, in violation of Amendments I, V and XIV to the United States Constitution, where:

(i) A licensed physician and surgeon (as in the

instant case) is not given an opportunity to confront the administrative agency (the respondent Board of Medical Examiners) which has the power to revoke licenses, either in defense of an accusation brought to revoke such license or by way of mitigation, where members of other learned professions, *e.g.*, attorneys at law, are so permitted.

(ii) Physicians and surgeons are not afforded an opportunity to object to the finding made by the hearing examiner until such time as the findings have already been submitted to and acted upon by the respondent Board of Medical Examiners.

(iii) The license of an attorney at law may be revoked only after all reasonable doubts are resolved in favor of the accused and where, if equally favorable inferences may be drawn from a proved fact, the inference which leads to a conclusion of innocence, rather than one leading to a conclusion of guilt, will be accepted, but the same standards are not applied in a proceeding commenced for the purpose of revoking the license of a physician and surgeon.

2. Whether the judicial interpretation of the scope of review (both primary and appellate) of administrative proceedings pursuant to the provisions of California Code of Civil Procedure section 1094.5 violates Amendments I, V and XIV to the United States Constitution, either on its face or, in the instant case, where:

(i) The onerous penalties and disabilities which can be imposed upon an individual such as appellant (including, as herein involved, the deprivation of the constitutionally protected right to engage in the profession of his own choosing) are subject to the most narrow and restrictive review, with the result that, for all practicable purposes, no

review at all is afforded.

(ii) The accused is denied the right to raise the issue of entrapment.

(iii) An aggrieved person is denied the right to work in his chosen and lawful profession pending appellate review, at the discretion of the appellate court (i.e., where the appellate court refuses to stay proceedings pending appeal, upon timely motion being made), so that the right to appeal becomes merely a sham and the appellate proceedings are thereby rendered moot.

3. Whether the administrative procedures employed by the respondent Board of Medical Examiners were violative of the Fourteenth Amendment to the United States Constitution, in that appellant was not afforded his constitutional right to cross-examine a witness and rebut evidence offered against him.

(d) STATEMENT OF THE CASE

On January 29, 1965, an accusation was filed against appellant, then a duly licensed physician and surgeon in the State of California, charging him with misconduct and praying that disciplinary action be taken against him. The basis of the accusation was that appellant had been convicted of the crime of unlawfully selling prescriptive narcotics (demerol and codeine). [Appellant was granted probation for this offense and, as of the time a Petition for Hearing in the California Supreme Court was denied, appellant's record had been expunged pursuant to the provisions of California Penal Code section 1203.4.]

As a result of this accusation, on March 2, 1965, a hearing

was held before the entire respondent Board of Medical Examiners, at which time Officer Booth Shaw – the police officer who was involved in the arrest of appellant in the criminal case – testified in support of the accusation. (BT 10-30.)[1] Thereafter, and although appellant expressed a desire that the matter not be continued (BT 45), and after a vote taken by the Board in executive session, the matter was assigned to a Hearing Officer (BT 45-46). At no time during the hearing held on March 2, 1965, or thereafter, was appellant afforded an opportunity to cross-examine Officer Shaw, although he requested to do so (BT 44).

On June 28, 1965, a hearing was held before George K. Bellows, a Hearing Officer. Upon the completion of this hearing, and on July 8, 1965, the said Hearing Examiner issued his "Proposed Decision," by the terms of which it was recommended that appellant's certificate to practice medicine and surgery in the State of California be revoked (CT 16-22).

On July 23, 1965, the "Proposed Decision" of the Hearing Officer was adopted by the respondent Board as its decision, and it was ordered that appellant's certificate be revoked effective August 23, 1965 (CT 23).

On August 23, 1965, appellant filed a Petition for Writ of Mandate to Compel Reinstatement of His Certificate to Practice Medicine and Surgery Following Revocation and for Stay or (*sic*) Operation of Administrative Order Pending Final Judgment (CT 35-37). On this date, the court decided

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1 As used herein CT and RT refer to the Clerk's and Reporter's Transcripts on Appeal, respectively. Additionally, BT refers to the transcript of the hearing before the Board of Medical Examiners on March 2, 1965. This transcript was admitted into evidence as Exhibit "A" at the hearing held in the Superior Court (RT 44).

to issue an Alternate Writ of Mandate and stayed execution of the Order of the respondent Board, on condition that appellant possess neither a Federal Narcotics Stamp nor prescriptions and not himself use narcotics except on medical prescription therefor (CT 78). The Alternate Writ of Mandate was actually issued on October 1, 1965 (CT 38-40).

On January 28, 1966, the Superior Court, after motion duly made, granted appellant's motion to file an amendment to the Petition for Writ of Mandate (CT 43). On said date, the Amendment to Petition for Writ of Mandate (adding a second cause of action) was filed (CT 44-48).

On March 25, 1966, a hearing was held on the Petition for Writ of Mandate. During this hearing, counsel for appellant moved the court to reopen the case presented on behalf of appellant and further moved the court for permission to present testimony on the issue of entrapment; both motions were denied (RT 40 and CT 177).

On May 27, 1966, the Superior Court issued its order denying appellant's Petition for Writ of Mandate (CT 61).

On August 23, 1966, appellant filed a Motion for New Trial (CT 205-207), which motion was denied on October 4, 1966 (CT 210). Appellant's Notice of Appeal was also filed on August 23, 1966 (CT 70). Prior to the filing of the record in the Court of Appeal, motions were made pursuant to section 1094.5 for a stay of the Order of Revocation pending appeal. All of these motions were denied.

With the exception noted below, the federal questions sought to be reviewed were presented in the trial court (the Superior Court of the State of California for the County of Los Angeles) by way of the Petition for Writ of Mandate filed on August 23, 1966 (CT 1-10), the Supplement to the

Petition for Writ of Mandate (CT 35-37) and the Amendment to the Petition for Writ of Mandate (CT 44-48) and also at the hearing of the Petition for Writ of Mandate (See, *e.g.*, RT 6-16; 25-27; 40, 43-44). The Petition for Writ of Mandate was denied in the trial court.

Appellant presented the federal questions sought to be reviewed herein to the Court of Appeal of the State of California in Appellant's Opening Brief, in a Reply Brief, and in a Petition for Rehearing. Because of the provisions of Code of Civil Procedure section 1094.5, the first opportunity that appellant had to raise the issue that section 1094.5 is unconstitutional, insofar as the appellate review and stay on appeal procedures established there are concerned, was in the Court of Appeal; all other constitutional issues were, as previously indicated, timely raised in the trial court. The judgment of the trial court was affirmed by the Court of Appeal and the Petition for Rehearing was denied, respectively. In affirming the judgment of the trial court and holding section 1094.5 constitutional, the Court of Appeal stated:

> "Respondent filed its brief in this case on July 13, 1967. Thereafter, some 29 days later appellant filed what is denominated a reply brief wherein he 'submits the following for the consideration of the court,' – that the Administrative Procedure Act (Gov. Code, sec. 11500 et seq.) is unconstitutional as applied to Doctor Shakin. There is no merit to such assertion. The act is constitutional. Appellant then refers to rule 40 of section 6068 of the Business and Professions Code. There is no such numbered rule under such numbered section. Further, appellant asserts that section 1094.5,

Code of Civil Procedure is unconstitutional as applied to the facts of this case. This assertion also lacks merit. The act as here applied is constitutional." (254 ACA 109, 120.)

Appellant presented the federal questions sought to be reviewed herein to the California Supreme Court in a Petition for Hearing, which petition was denied without opinion.

(e) The federal questions presented herein are substantial, in that California Code of Civil Procedure section 1094.5 has been held constitutional after having been challenged on the ground that the interpretation and application of this section to licensed physicians and surgeons in general, and to appellant in particular, violated the First, Fifth and Fourteenth Amendments to the United States Constitution, in that the appellant has been unconstitutionally deprived of the right to engage in his chosen and lawful profession.

Other substantial federal questions presented involved the denial of the right to confrontation of witnesses at administrative proceedings and the right to present rebuttal evidence in such a proceeding, as well as the denial of the right to present evidence on the issue of entrapment.

CONCLUSION

This appeal presents questions of constitutional dimension which go to the very heart of administrative proceedings wherein it is sought to revoke the license of a physician and surgeon who has spent great amounts of time, effort and money in order to obtain his license to practice. It is respect-

fully submitted that because substantial constitutional questions are presented in this appeal, plenary consideration should be given to it.

Respectfully submitted,

MARKS & SCHNEIDER

BURTON MARKS

HARVEY A. SCHNEIDER

Attorneys for Appellant

OPINION OF THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA